NO. 82-660

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

UNITED STATES OF AMERICA,

Petitioner

v.

HARRISON P. CRONIC,

Respondent

RESPONSIVE BRIEF TO THE PETITION FOR WRIT OF CERTIORARI

HARRISON P. CRONIC
Pro Se
621 Dixon Drive
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QUESTIONS FOR REVIEW

I.

IS THE SIXTH AMENDMENT REQUIREMENT OF EFFECTIVE ASSISTANCE OF COUNSEL APPLICABLE TO A DEFENSE COUNSEL WHO FAILS TO ADEQUATELY INVESTIGATE OR OTHERWISE COMPLETELY PERFORM DEFENSE FUNCTIONS AT EITHER TRIAL OR SENTENCING.

A. DOES INVOKING THE SIXTH AMENDMENT UNDER THE ABOVE CIRCUMSTANCES REQUIRE A PREVIOUS DEMONSTRATION BY THE DEFENDANT THAT COUNSEL'S ACTIONS, OR LACK THEREOF, ADVERSELY AFFECTED THE DEFENDANT'S TRIAL.

B. IF THIS CONDITION IS A PREQUISITE TO INVOLVING A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL, MUST PREJUDICE BE SHOWN.

C. IF SO, DOES THIS BURDEN REST UPON THE DEFENDANT OR GOVERNMENT.

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STATEMENT OF THE CASE

Subsequent to an investigation of approximately "five years duration" (United States of America v. Harrison P. Cronic, 675 F.2d 1126, at 1127, 1128, (10th Cir. 1980), and the presentation of "literally thousands of documents" (United States of America v. Cronic, Supra, at 1128), presented to four successive grand juries in 1977, 1978, 1979, and 1980,[1] Harrison P. Cronic, Wylie C. Merritt, and Carolyn S. Cummings were indicted in the United States District Court for the Western District of Oklahoma on February 5, 1980, on thirteen counts of mail fraud and the unlawful use of a fictious name in violation of 18 U.S.C.A. Section 1341 and 1342.

Cronic, upon being notified of this indictment via a long distance call by his attorney, Arnold D. Levine, and, subsequent to arrangements made by Levine, voluntarily surrendered himself to the U. S. Marshall's office in Tampa, Florida, on February 12, 1980. On February 15, 1980, Harrison P. Cronic and Carolyn S. Cummings appeared in U. S. District Court, Oklahoma City, Oklahoma, for arraignment with their counsel, Levine, who indicated at this hearing, "rather authoritatively" (Tr. Motion to Withdraw, page 4, lines 8-10) that there was no conflict between representing both Cronic and Cummings. During the insuing months Levine filed in behalf of his clients, Cronic and Cummings, 21 different motions, totalling 54 pages. However, on June 2, 1980, Levine filed in the U. S. District Court, Western District of Oklahoma, a Motion for Leave to Withdraw as counsel for Harrison P. Cronic, alleging that "an irreconciliable conflict" of interest existed between Cronic and Cummings, and stated in his Reply to Motion Filed by Harrison P. Cronic that Cronic had never "imparted any confidential

[1]Defendant's Motion for Discovery of Matters Pertaining to the Grand Jury, filed by Arnold D. Levine.

information to the undersigned (Levine) or information detrimental to Mr. Cronic in connection with his positions herein".[2]

Cronic resisted these Motions by Levine in his pro se Motion to Deny the Withdrawal of Mr. Arnold D. Levine, as counsel, for Harrison P. Cronic,[3] in which he disputed the allegation that he had not discussed the case with Levine as his counsel,[4] and stated that "information imparted to him (Levine) on a client attorney basis may now be used against him in Cummings' interest". Cronic simultantiously asked the Court either to deny Levine's Motion or compel Levine to withdraw as counsel for Cummings as well. Subsequently the District Court held a hearing regarding this question of June 12, 1980. At this hearing, in which Levine was represented by an associate Herbert M. Berkowitz, it was determined that the issue could not be resolved without the personal presence of Levine. Therefore, the Court ordered a second hearing be held on June 19, 1980, in which Levine himself was ordered to appear. At this hearing, in which Cronic was compelled to cross examine his former attorney without benefit of counsel (Tr. Motion to Withdraw, page 5, lines 20-25, page 6, lines 1-13)[5] Cronic demonstrated that Levine's real reason for

[2]Levine had continuously represented Cronic in all legal matters since 1975. Levine, had, additionally, represented Cronic on several occasions in 1974, (Pro Se Opening Brief for Apoellant, page 3).

[3]Hereinafter abbreviated as "Motion In Opposition".

[4]Given these set of facts, one would have to assume that Levine failed to speak with either Cronic or Cummings concerning this indictment for almost four months. (From February 12, 1980, when Cronic appeared with Levine in Tampa, Florida, to surrender himself, until June 2, 1980, the date of the Motion to Withdraw filed by Levine.

[5]Because of the ambiguity of the District Court's Order of June 12, 1980, regarding provisional appointment of counsel, Cronic was required to cross examine his former attorney, Levine, without benefit of counsel in violation of both the Sixth and 14th Amendments. (Cronic had telephonically spoken with the provisionally appointed counsel Colston on June 12, 1980, and had been told by Colston that it was pointless to discuss the case until such time as the Court ruled on Levine's Motion to Withdraw).

withdrawing as counsel for Cronic was over non-payment of fees,[6] and that the conflict of interest question was simply a permissible shield with which to conceal his (Levine's) true purpose.[7] The Court, itself, seemed to recognize this ploy of Levines' when it stated "it's ironic that the letter you wrote him about the fee told him you were going to withdraw if he didn't pay it came about the time you found out you were...he, attached that to his response here" (Tr. Motion to With, page 4, line 25; page 5, lines 1-3). The Court referred to Cronic's Motion in Opposition, Exhibit No. 1, attached to his Motion in Opposition, (a letter written to Cronic by Levine on April 2, 1980), which stated "if I do not receive $25,000 by Friday,

[6]This pro se Motion filed by Cronic caused some degree of misunderstanding by the 10th Circuit wherein the Court viewed Cronic's request for a more experienced counsel, (and the District Court's response that if Cronic wanted an attorney of his own choosing he should hire one) combined with Cronic's "professed ability" to come up with $350,000 to reimburse a defrauded bank, after he had been convicted, (United States of America v. Cronic, supra, at 1129,F.N.2) and Cronic's declared indigency, after stating that it was unreasonable of Cronic's retained counsel, to believe he would not be paid in full, as somehow being conflicting.

The Appellate Court failed to take note that Cronic always maintained,and the District Court recognized,that Cronic was relying upon two wealthy aunts not himself (Tr. of Sentencing, page 3, lines 15-22; page 8, line 4) to provide the funds for any payment to the bank. Cronic never agreed that a figure of $350,000 was owed to the bank (Supplemental Record on Appeal,[8] page 30, item 63) because the bank would never allow an audit, (SRA, pages 17, 19, item nos. 39, 40, 41, respectively, pages 111-124),and Cronic had stated earlier in his pro se Motion in Opposition that his "aunt has, for the most part paid all legal fees for the undersigned to Mr. Levine". Hence, there is no contradiction in these statements. Due to the age, family opposition, and severe medical conditions of both aunts, neither was subsequently able to provide Cronic with defense funds.

[7]This is especially significant in that Levine had told Cronic "I have my own ways to collect (Cronic's Motion in Opposition) during a discussion with Cronic over fees on June 3, 1980. Thus, Levine was still continuing to discuss this case with Cronic even though he had already made his decision to withdraw.

[8]Hereinafter abbreviated as "SRA". This constitutes Cronic's Motion For New Trial Based on Newly Discovered Evidence, pages 2-173.

April 4, 1980, I will make a Motion to Withdraw". After a rather heated exchange between Cronic and Levine (Tr. Motion to Withdraw, page 13, lines 11-25; page 14, lines 1-13), the Court allowed Levine to withdraw as counsel for Cronic and continue to represent Cummings (Tr. Motion to Withdraw, page 14, lines 7-13)[9] At the conclusion of the hearing, the government indicated that Levine had previously commenced plea negotiations in Cummings' behalf, even before being released as attorney for Cronic (Tr. Motion to Withdraw, page 20, lines 11-22). It was at this hearing that Cronic first objected to the appointment by the Court of Chris Colston as his court appointed counsel, on the grounds that Colston was a specialist in real estate law (Tr. Motion to Withdraw, page 23, lines 10-14), with no experience in Criminal law (United States of America v. Cronic, supra, at 1129, F.N.2),[10] and no trial experience (Tr. of Proceedings, page 92, lines 12-14).

[9]The position taken by the U. S. District Court and the United States Court of Appeals for the Tenth Circuit on this issue indicates that both courts required Cronic to demonstrate a showing of prejudice in Levine's continued representation of Cummings. The requirement by these courts of the demonstration of prejudice is completely contrary to established case law. (T.C. Theatre Corp. v. Warner Bros. Pictures, 113 F. Supp. 265, Richardson v. Hamilton, Int'l Corp., 469 F.2d 1382, Cert. denied 411 U.S. 986, Emle Inds. Inc. v. Patentex, Ind., 478 F.2d 562, Waters v. Western Co. of North America, 436 F.2d 1072). See also Canon No. 4, EC-4-1-4-4, 4-5, 4-6, Dr. 4-101(A), Dr. 4-1-1(B)(1)(2), Canon 9, EC 9-1, EC 9-2, EC 9-6). It would appear to be rather a far fetched notion that an attorney who represented Cronic, Cummings, and the corporation involved (Skyproof Mfg., Inc.) and, who had previous to this indictment, represented Cronic for five years, has never been entrusted with any information of any type which may be detrimental in some manner to his former client (Cronic). Based on Levine's long association with Cronic, he should have been compelled to withdraw as attorney for both Cronic and Cummings, upon a showing of adverse interest, regardless of whether he did or did not speak with Cronic concerning any matters directly related to the indictment of February 5, 1980.

[10]Subsequent to Cronic's trial it was determined that Colston had never represented anyone in a federal criminal trial.

Cronic, additionally at this time, raised the insufficiency of time for his court appointed counsel (Colston) to prepare for trial stating "I don't feel like that I could possibly get a fair defense giving my attorney one or two weeks to prepare for this when Mr. Levine has had the advantage of a five year investigation, all the documentations, a complete review of all of that prior to my testimony before a federal grand jury in Tampa," (Tr. Motion to Withdraw, page 15, lines 10-15). The trial had previously been schedule to begin on June 30, 1980, (Tr. Motion to Withdraw, page 17, lines 17-19), but the Court granted a continuance until July 14, 1980. (Tr. Motion to Withdraw, page 19, lines 9-11). Thus, from the date of Colston's confirmed appointment on June 19, 1980, until the date the trial began on July 15, 1980, was a period of 25 days.[11] Levine, "a former United States Attorney, and practiced in federal court for twenty years" (Tr. Motion to Withdraw, page 3, lines 4-5), recognized the inherent difficulty the Court was placing upon Colston in relation to the short amount of time for defense preparation allowed prior to trial when he stated "I would respectively submit to your honor that if defense counsel were to devote all of his working days, he might be able to be ready in 30 days, might be, if he were to devote all of his time to this case" (Tr. Motion to Withdraw, page 18, lines 15-18). Levine further stated that defense counsel would have to review approximately two feet of material" (Tr. Motion to Withdraw, page 18, lines 7-9).[12]

[11]Disregarding the long weekend of July 4, 1980, in which all private and governmental offices were closed, Colston had at most 18 to 22 days to prepare for trial, assuming that he worked seven days a week and devoted his entire time to nothing but the Cronic case.

[12]Cronic determined, by using mathematical calculations, that it would take 72.91 days to read two feet of material reading

(F.N. 12 continued on page 6)

Colston never made any further request for an extention of time although he himself felt that he had inadequate time to prepare. Moreover, Dr. Virginia A. Boyle, Ph.D., Licensed Applied Psychologist, stated prior to trial that (Colston) "...In feeling insecure... and under the severe time constraints...likely did not feel competent in representing this case.....(but) it might have been difficult for him to admit his weakness in this instance, and, as such, could not bring himself to withdraw from your case...This could account for the initability and defensiveness he showed toward you" (SRA, page 26, 27, 28, 29, Item Nos. 56, 58, 59, 61, respectively, pages 125-132).[13]

Additionally, Colston sought and was provided funds by the Court to hire an investigator, (Tr. Motion to Withdraw, page 21, lines 6-25), and an accountant (Tr. Motion to Withdraw, page 22, lines 1-4) for trial preparation. Counsel made no use of the funds and never conducted an investigation of the fraud charged.

12 (cont'd) eight hours per day or 36.45 days reading sixteen hours per day. Calculations were based on the following facts:

A. Two feet of material was determined to equal 15,312 pages (Volumes 426, 427, 428, 429, and 430, Federal Reporter 2d series, equals almost one foot exactly or 7656 pages. This was doubled to equal the two feet referred to, or 15,312 pages).
B. There are 60 minutes per hour or 480 minutes per day, an average person reads at approximately 300 words per minute or 144,000 words per day (480x300).
C. In the volumes referred to in (A), there are an average of 686 words per page.
D. By dividing the number of words per day (B) by the number of words per page (6), one finds that an average person would read 210 pages per day in an eight hour period. (Although all government documents in its two foot stack will not be composed of this many words per page, it was felt that this would equalize[4] by the fact that additionally time would be required by counsel to absorb and carefully review same. Thus, these two variances would equalize each other).
E. By dividing the total number of pages 15,312(A) by the number of pages read per day 210(D), it is determined that it would take 72.91 days reading eight hours per day or 36.45 days reading 16 hours per day to read the government's two feet of material. This does not allow for trial preparation itself, merely the reading of documents. (Pro se Respondent Brief of Appellant, pages 13-14).

13 A violation of the ABA Standards relating to the Defense Function 3.1(A) (1971 Approved).

SRA, pages 24, 25, 26, 173, Item Nos. 49 - 55, respectively). In an effort to minimize and ameliorate these actions by Colston, the government, in its Petition for Rehearing and Suggestions For Rehearing En Banc attached an affidavit of Mr. Ryland Rivas avering that he "had extensive experience in the practice of criminal law" and that he "assisted Mr. Chris Colston in his preparation of defenses for Harrison Cronic and was present during all stages in the proceedings to assist Mr. Colston with the preparation and drafting of motions, examination of witnesses and examination of all evidence available to Mr. Colston."[14]

This statement by Rivas does not lessen the impact of Colston's inadequate and indifferent representation but rather compounds and magnifies the impact of such representation when participated in by a person who had had "extensive experience in the practice of criminal law." The gross nonfeasance by Colston and Rivas is underscored by the fact that neither consulted with Cronic to any substantive degree during the proceedings except for approximately four hours on July 13, 1990, the day before trial began.[15] (SRA, page 28, Item 60).

Most importantly, however, neither of these attorneys conducted any factual investigation of the fraud charges.[16]

[14]This affidavit attached to the government's Petition for Rehearing is not allowed under the Federal Rules of Common Appellate Procedure, Rule 40, 28 U.S.C.A. Permission for filing such an affidavit was neither sought by the government nor granted by the Court. See also (Sound Ship Bldg. Corp. v. Bethelhem Steel Co., Inc.) (C.A.N.J. 1976, 533 F.2d 96, Cert. denied 429 U.S. 860).

[15]A violation of the ABA Standards relating to the Defense Function 3.8 and 5.2(B) (1971 Approved).

[16]Thus both Colston and Rivas grossly violated the ABA Standards relating to the Defense Function (1971, Approved) 4.1 which states "it is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all answers leading to facts relevant to guilt and degree of guilt or penalty. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or his stated desire to plead guilty."

Cronic, himself, not his attorneys, located, subsequent to the trial and sentencing, documents in the U. S. District Court for the Eastern District of Texas,(SRA, pages 3, 23, 39, 55) which completely contradict the testimony of two key government witnesses, Messr. Heiple and Bumgarner, that the bank had only been repaid $9,000 (of the claimed $484,000 loss),(Tr. of Proceedings, page 179, lines 2-5, page 438, lines 7-8), that the bank was "hanging on its fingernails"[17] (Tr. of Proceedings, page 174, line 21), and that Cronic was always considered by them, and others, to be the real and true owner of Skyproof Mfg., Inc., the corporation in question, (Tr. of Proceedings, page 186, lines 22-24, page 318, lines 1-4, page 373, lines 5-25, page 374, lines 1-7, page 436, lines 11-13. SRA, page 7, Item Nos. 16, 17, page 15, Item No. 35, page 16, Item No. 36, page 17, Item No. 37, see also SRA, pages 45-56, 73, 96-102, 142-167). The latter statement is extremely crucial in that the government itself acknowledges, in its Petition for Writ of Certiorari that the conviction rested "principally on the credibility of the testimony of his two co-defendants and several other witnesses" (Page 19, F.N. 11, Petition for Cert.).

In fact, there was no documentary evidence of any type connecting Cronic with the alleged crimes other than the heretofore described testimony. Thusly, anything which would attack the credibility of these witnesses was of paramount importance. The evidence discovered by Cronic was more than cumulative or impeaching and his attorneys Colston and Rivas, could not effectively cross-examine these witnesses as to the fraud charged because they did not have the previously described facts

[17]The bank, in fact, had a reserve for bad debt losses of only $20,146.13 during the fourth quarter of 1975, the period in question. In fact, the bank had actually deceased its reserve for bad debt losses by over 100% during the period in question. (Pro Se Opening Brief for Appellant, Appendix, Exhibit No. 2).

upon which to vigorously challenge statements made by these individuals. Furthermore, and most dramatically, these documents strike to the very core of the guilt or innocence of Cronic in that statements made by government witnesses as to their belief of ownership of the corporation involved was completed contradicted by documents which they themselves had originated and prepared. (SRA, pages 3-18, Item Nos. 4-42) Thus, there is no doubt that counsel for Cronic failed to properly investigate "the facts relevant to guilt and degree of guilt or penalty."[18] Hence, the attorneys, Colston and Rivas, by failing to conduct a factual investigation, and thereby violating the most elemental requirement of effective advocacy of a client's interest, did not meet the criteria that attorneys act within the "range of competence demanded of attorney's in criminal cases" (McMann v. Richardson, 397 U.S. 759, (1970) at 772.

Furthermore, had a proper investigation been conducted by Cronic's attorneys prior to the trial, this evidence would have been extremely important in attacking the credibility of testimony given by Merritt and Cummings, (SRA, pages 18-23, items Nos. 42-44, pages 39-110) in that it further demonstrates that past actions of these individuals as to the owner of the corporation at issue was completely different from their testimony at trial.

During the course of the trial Cronic stated on several occasions that his court appointed counsel was doing a good job. (Tr. of Proceedings, page 568, Lines 1-12, page 571, lines 17-25). This statement did not reflect Cronic's true opinion, but was done at the specific instruction of Dr. Virginia A. Boyle, Ph.D., Licensed Applied Psychologist, who had advised Cronic P-R-I-O-R to the trial that because of court-appointed counsels irritiability and defensiveness displayed toward Cronic that he (Cronic) could best improve the situation by "...praise the work he did

[18] ABA Standards relating to the Defense Function 4.1 (1971 Approved).

as much as possible and particularly in public" (SRA, pages 27-28, Item No. 59, pages 127-132).[19] This is precisely what Cronic did, since the trial court had refused Cronic's prior request to provide him with more qualified counsel (Tr. Motion to Withdraw, page 23, lines 8-23).

Additionally, this failure by counsel resulted in Cronic not being able to rebut factual information used at sentencing (Pro Se Opening Brief of Appellant, pages 17-26) which resulted in Cronic being sentenced on incorrect and misleading information. (Pro Se Opening Brief of Appellant, pages 27-30).[20] Court appointed counsel also had a conflict of interest which he failed to inform the court about, (SRA, page 29, item 62, page 133),[21] and in fact there is a serious question as to whether Colston and Rivas worked adversely to Cronic, and his specific instructions, when in a meeting on August 6, 1980, with Judge Eubanks, Mr. Heiple and others Cronic's counsel agreed to accept the figure of $350,000.00 owed the bank as being correct, without the right to review bank records, a direct contravention of specific instructions given to Colston by Cronic the previous night. (SRA, page 30, Item No. 63, page 118, Exhibit No. 28. See also Pro Se Opening Brief for Appellant, page 17, F.N. 1).[22] On July 17, 1980, the jury found defendant Cronic guilty on eleven counts (1, 4-13) and not

[19] However, even if Cronic had made these statements of his own volition, and not on the advise of a trained and licensed psychologist of what importance are they? Is the government suggesting that the level of acceptable performance of a court appointed counsel is to be determined by the opinion of an untrained laymen? How absurd.

[20] A violation of the ABA Standards Relating to the Defense Function 8.1(B)(1971 Approved).

[21] A violation of the ABA Standards Relating to the Defense Function 3.5(1971 Approved).

[22] A violation of the ABA Standards Relating to the Defense Function 1.1(B)(D), 1.6 (1971 Approved).

guilty of the remaining two counts (2, 3) (Tr. of Proceedings, 601, lines 8-17). Pursuant to the Federal Rules of Criminal Procedure, Rule 33, 18 U.S.C.A. Cronic filed on March 11, 1981, a Motion for New Trial Based on Newly Discovered Evidence in the United States District Court for the Western District of Oklahoma. This motion was denied one day later on March 12, 1982, by U.S. District Judge Luther B. Eubanks on the procedural ground that since an appeal was pending in the Cronic case the motion could only be granted upon remand of the case.[23] Cronic objected to this holding by the District Court on the grounds that it was an improper reading of Rule 33, and filed on April 17, 1981, with the U. S. Court of Appeals, for the Tenth Circuit, a Motion to Reverse the District Court's Denial of a New Trial, and asked that the Appeals Court "hold in abeyance any further action in this case until a hearing, and a determination of that hearing, is completed by the District Court for the Western District of Oklahome". On May 7, 1981, the Appellate Court denied Cronic's Motion and ordered that the Motion for New Trial Based On Newly Discovered Evidence be "submitted to the Court together with briefs". It is inferred from this ruling that the Tenth Circuit concluded upon a review of Cronic's Motion (SRA, page 1-173) that a hearing was unnecessary at the District Court level since the Newly Discovered Evidence was of sufficient documentary strength as to not require testimony, and therefore the Appellate Court, itself, was empowered to rule upon the issues of fact contained in Cronic's Motion for New Trial.

[23] F.R.C.P., Rule 33, 18 U.S.C.A. allows the District Court to conduct evidentary hearings upon a Motion For New Trial Based On Newly Discovered Evidence, but it may not grant, if so inclined, said Motion unless the Appellate Court first remands the case back to the District Court; a point the District Court failed to properly distinguish. Thus the District Court denied Cronic's Motion on procedural grounds and not on the merits of the Motion itself.

Subsequent to reviewing the record on appeal and the supplemental record on appeal ("SRA") containing Cronic's Motion For New Trial Based On Newly Discovered Evidence, where the issue of ineffective assistance of counsel was properly raised for the first time, the 10th Circuit Court of Appeals reversed Cronic's conviction on ineffective assistance of counsel, stating that "when circumstances hamper a given lawyer's preparation of a defendant's case, the defendant need not show specified errors in the conduct of his defense in order to show ineffective assistance of counsel... This is an eminently reasonable rule, for there is no way an appellate court can say precisely how a given case would have been handled by a reasonably diligent and properly prepared lawyer. The prejudice from lack of preparation and experience cannot be nicely weighed". (United States of America v. Cronic, supra, at 1128.) The court further added that "there was no conflict between its prior decisions in United States v. King, 664 F.2d 1171 (10th Cir. 1981); United States v. Golub, 638 F.2d 185 (10th Cir. 1980) and the Supreme Court's opinion in United States v. Morrison, 449 U.S. 361 (1981) holding that "nothing in Morrison suggests that reversal of a conviction may not be 'relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial'"(quoting from Morrison, supra, at 365). Thus, the Tenth Circuit's approach to Sixth Amendment violations of ineffective assistance of counsel, and the issue of prejudice is to apply a harmless beyond a reasonable doubt criteria, once the defendant has met the initial burden of showing that defense counsel's actions did not meet the "reasonable diligence and skill test", United States of America v. Poterfield, 624 F.2d 122, at 125 (10th Cir. 1980) with the burden being placed upon the government.

On July 16, 1982, the Tenth Circuit denied the government's Petition For Rehearing And Suggestion For Rehearing En Banc.

On October 14, 1982, a Writ of Certiorari was filed by Rex E. Lee, Solicitor General, in the Supreme Court of the United States.

ARGUMENT

Cronic, while vigorously disagreeing with the position taken by the government vis-a-vi the decision in the instant case by the Tenth Circuit Court of Appeals, does believe that the issue contained in the Question for Review presents a very significant area of criminal law, which, because of the divergent ruling of the various Circuits, requires resolution by this Court. Additionally, the case at bar provides both the necessary documentary evidence and the requisite set of factual circumstances necessary for a clear and concise ruling on this question.

This Court held in McMann v. Richardson, 397 U.S. 759 at 77 (1970), that "defendants facing felony charges are entitled to the effective assistance of counsel...within the competence demanded of attorneys in criminal cases."

The Court further added: "Beyond this we think the matter, for the most part, should be left to the good sense and discretion of the trial courts with the admonition that if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts." (Emphasis added).

Thus, while adopting an objective standard to be applied to the claim of ineffective assistance of counsel,[24] the Court has

[24]All circuits except the Second Circuit United States v. Williams, 575 F.2d 388, at 393 (1978) have adopted this objective standard criteria as outlined in McMann, supra, First Circuit; United States v. Bosch, 584 F.2d 1113 at 1121 (1978); Third Circuit: Moore v. United States, 432 F.2d 730 at 736 (1970) (en banc); Fourth Circuit: Marzullo v. Maryland, 561 F.2d 540 at 543 (1977); Fifth Circuit: Akridge v. Hooper, 545 F.2d 457 at 459 (1977); Sixth Circuit: Beasley v. United States, 491 F.2d 687 at 696 (1974). (F.N. 24 continued on page 16)

declined up until the present time, to establish any type of fundamental guidelines whereby ineffective assistance of counsel may be measured. The entire issue, along with all attendant secondary questions, i.e., prejudice, of what constitutes a minimum standard of performance by a criminal defense attorney has been left to the lower courts to resolve (Accord Tollett v. Henderson, 411 U.S. 258 at 266 (1973).

Unfortunately, the lower courts, far from having resolved this question, have become a vertible kalidescope of conflicting opinions both intra and inter Circuit.

The pivotal question among the Circuits relating to a claim of ineffective assistance is whether, once "a failure to perform some duty, as essential as the duty of investigation, owed by a defense attorney to his client" (McQueen v. Swenson, 498 F.2d 207 at 218) has been established, is that constitutional violation, in and of itself, sufficient to require relief. If not, is the burden upon the defendant or government to demonstrate prejudice, and if the defendant to what degree must this be evident, and may the government then defeat this showing by a harmless error approach. There are recognizable, institutionalized areas of ineffective assistance, such as the failure to appoint counsel, Gideon v. Wainwright, 373 U.S. 335 (1963)[25] interference in client attorney relationship (Geders v. United States, 425 U.S. 80 (1976), or the tardy appointment of counsel which restricts the attorney's ability to represent his/her client due to lack of time to properly prepare a defense, (Powell v. Alabama, 287 U.S. 55 at 71), which, by their very existence, require a catergorical approach to the violation involved and are on their very face presumptively harmful.

24 (con'd) Seventh Circuit: United States ex rel. Williams v. Twomey, 510 F.2d 634, at 640 (1975); Eighth Circuit: United States v. Easter, 539 F.2d 663 at 666 (1976), Ninth Circuit: Cooper v. Fitzharris, 586 F.2d 1325 at 1328 (1978) (en banc), Tenth Circuit: Dyer, v. Crisp, 613 F.2d 275, at 278 (1980) (en banc); D.C. Circuit: United States v. DeCoster, 487 F.2d 1197 at 1202 (1973).

25 One could reasonably argue that there is no substantial difference in the government appointing no counsel and appointing an unqualified, ineffective one.

There is presently, however, among the Circuits, no agreement as to the degree of prejudice which a defendant must evidence, absent institutionalized, categorical violations, in order to prevail on a Sixth Amendment challenge in this area. Only one Circuit, the Sixth, requires no showing of specific prejudice resulting from defense counsel's representation (Beasley v. United States) supra, holding in that decision that "Harmless error tests do not apply in regard to the deprivation of a procedural right so fundamental as to the effective assistance of counsel" (Id at 696). This ruling by the Sixth Circuit may be subject to change since United States v. Morrison, 449 U.S. 361 (1981). In Morrison, the Court addressed the issue of prejudice within a Sixth Amendment framework by holding that "the constitutional infringement idenified has had or threatens some adverse effort upon the effectiveness of counsel's representation or has produced some other prejudice to the defense" Id. at 365. A reading of the SRA (Supplemental Record on Appeal) amply authentiates that the Tenth Circuit's reversal of Cronic's conviction on ineffective assistance of counsel is completely compatable with[26] the Supreme Court's decision in Morrison.

This does not imply that the defendant must demonstrate prejudice to the extent that "the defendant would have been acquitted but for counsel's blunders". (Cooper v. Fitzharris, 586 F.2d 1325, at 1333 (1978) 9th Cir. (en banc). The defendant to obtain "relief on the basis of a claim of ineffective assistance of counsel must generally make a showing of prejudice, this prejudice requirement is satisfied by demonstrating that but for his counsel's ineffectiveness his trial, but not necessarily its outcome, would have been altered in a way helpful to him" (Washington v. Strickland, 637 F.2d 879 at 902 (5th Cir.) (1982).

[26] Ibid. This brief for a detailed description of the prejudice resulting from the failure by Cronic's court appointed counsel to conduct a factual investigation prior to trial, and the insufficient amount of time allowed for trial preparation. Pages 4-10.

The Fifth Circuit, in Washington, adopted an approach previously held in three circuits, the Third, Eighth, and D. C. The Third Circuit in United States ex rel. Green v. Rundle, 434 F.2d 1112, at 1115 (2nd Cir. 1970) held that the defendant bears the limited responsibility for demonstrating that "the missing evidence (not made available to the defendant because of ineffective assistance) would be helpful". The Third Curcuit, further clarified the issue, in United States ex rel. Johnson v. Johnson, 531 F.2d 169, at 177 (3rd Cir.) (1976), when it held that the state may avoid relief sought by the defendant,even though the initial burden has been met by the accused, by a showing that the alleged failure of counsel was "harmless beyond a reasonable doubt".The Eighth Circuit in McQueen v. Swenson, 498 F.2d 207, at 220 (8th Cir. 1974) adopted virtually the identical position taken by United States ex rel. Green v. Rundle, supra, and United States ex rel. Johnson v. Johnson, supra, when it stated that "the petitioner must shoulder an initial burden of showing the existence of admissible evidence which could have been uncovered by reasonable investigation and which would have proved helpful to the defendant... Once this showing is made, a new trial is warranted unless... such evidence was harmless beyond a reasonable doubt." (Burden then shifting to the government). In United States v. Wood, 628 F.2d 554 at 559 (D.C. Cir. 1980) (en banc), the D.C. Circuit clarified its fractous decision in United States v. De Coster, 624 F.2d 196 (D.C. Cir. 1979) (en banc)[27] when it held in Wood that a defendant is required to "establish some basis for believing that a different kind of preparation would have resulted in the presentation of a contrary line of testimony for the jury's

[27]A close scrunity of the D.C. Circuit's opinion in the Decoster case indicates that it never required the defendant to demonstrate prejudice to the extent that it would have affected the outcome of the trial. In fact a majority of the Court only required that "beneficial material facts" Id. at 232 would have changed not the outcome, but the "character" of the proceedings. The proof of this is in the D. C. Circuit's opinion in United States v. Wood, supra.

consideration." The Ninth Circuit also reflected this position in Cooper v. Fitzharris, 586 F.2d 1325 at 1331, (9th Cir. 1978) (en banc) when it addressed the issue of prejudice in the following terms: "when the claim of ineffective assistance rests upon specific acts and omissions of counsel at trial, as it does in this case, relief will be granted only if it appears that the defendant was prejudiced by counsel's conduct". However, in Cooper, the Nineth Circuit stipulated two significant provisions: (1) "If counsel is charged with multiple errors at trial, absence of prejudice is not established by demonstrating that no single error considered alone significantly impaired the defense function prejudice may result from the cumulative impact of multiple deficiences. (2) Finally, the requirement that prejudice appear does not mean that relief is available only if the defendant would have been acquiteed." Id. at 1333. Of the remaining Circuits, the First is uncommitted holding in United States v. Bosch, 584 F.2d 1113, at 1123, (Cir. 1978) that it was undecided as to "whether deprivation of effective assistance can ever constitute harmless error". Although the Second Circuit continues to adhere to the "farce and mockery" test for measuring the conduct of a defense counsel, the only remaining Curcuit to do so, (United States v. Williams, 575 F.2d 388, at 393 (2nd Cir.) (1978), it has in United States v. Aulet, 618 F.2d 182 (2nd Cir. 1980) and United States ex rel. Bradley v. McMann, 423 F.2d 656 (2nd Cir. 1970) indicated a strong tendency to require the defendant to demonstrate prejudice in order to obtain relief. The Fourth Circuit reached a similar conclusion in Coles v. Peyton, 389 F.2d 224 at 226 (4th Cir.) (1968) when it held that an "Omission or failure to abide by these requirements [of prompt appointment of counsel, adequate opportunity to prepare a defense, adequate consultation, and appropriate investigation] constitutes a denial of effective representation of counsel unless the state, on which is cast the burden of proof once a violation of these

precepts is shown, can establish a lack of prejudice thereby." The Seventh has as yet, no definitive opinion, and waives between the position in United States ex rel. Healey v. Cannon, 553 F.2d 1052 at 1057 (7th Cir.) (1977) that "the harmless error doctrine is patently inapplicable to the claimed deprivation of a due process right so fundamental as the effective assistance of counsel," and its position in United States v. Ingram, 477 F.2d 236 (7th Cir.) (1973) wherein it concluded that a claim of ineffective assistance may not prevail where no prejudice was demonstrated.

The Tenth Circuit in United States v. Poterfield, (624 F.2d 122) (10th Cir) (1980) stated that it is not accurate, however, to conclude that "prejudice" is a second tier in the test of competency. Reasonable diligence is the test. It would be a mockery in that case to say that the defendant was clearly guilty and that the incompetence of counsel made no difference. Where, as here, the imcompetence of counsel is pervasive, the defendant ought not to be required to prove prejudice on top of inadequacy. The burden should be on the government to establish the lack of prejudice." Id at 125. (Emphasis added). Hence, the Tenth Circuit, in essence, has adopted a harmless error criteria with the burden placed upon the government.

The application of Sixth Amendment safeguards as applied in the Cronic case,[28] citing United States of America v. King, supra, and United States of America v. Golub, supra, are especially compatible with the decision in the Fourth Circuit (Coles v. Peyton, supra, [29] and the Nineth Circuit (Cooper v. Fitzharris, supra, at 1333[30] citing the two significant provisions).

[28] United States of America v. Harrison P. Cronic, supra. at 1129.

[29] Ibid. Page 17.

[30] Ibid. Page 17.

An analysis of the Cronic case (with special emphasis upon the SRA in which Cronic substantiated his claim of ineffective assistance)[31] indicates that under any of the various and conflicting tests currently followed by the twelve Circuits, from the most stringent in the D. C. Circuit (United States v. DeCoster, supra), to the most liberal in the Sixth Circuit (United States v. Beasley, supra, Cronic meets any standard presently required, up to and including the likelihood that counsel's ineffectiveness would have affected the judgment of the jury.[32]

CONCLUSION

Although the judgment of the United States Court of Appeals, For the Tenth Circuit should be affirmed in the Cronic case, it would be greatly beneficial to all Federal Circuits if this Court should express itself on this very timely issue.

Respectfully submitted,

HARRISON P. CRONIC, Respondent
Pro Se
621 Dixon Drive
Gainesville, GA 30501

[31] Ibid.
Pages 2-173

[32] Dr. Nancy Lyons, University of Georgia, Department of Statistics and Computer Science, using the Binomial Probability Distribution Formula $\left(\sum_{x}^{n}\binom{N}{x}P^{x}(1-P)^{N-x}\right)$ determent that the probability with six or more jurors changing their minds, had they known of the payment to the bank (SRA) would have been 61.3%.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-660

UNITED STATES OF AMERICA,

Petitioner

v.

HARRISON P. CRONIC,

Respondent

CERTIFICATE OF SERVICE

STATE OF GEORGIA
COUNTY OF HALL

I, Harrison P. Cronic, after being duly sworn, deposes and says pursuant to Rule 28.31.5(c) of this Court he served the within Responsive Brief to Petition For Writ of Certiorari on the following parties by enclosing a copy thereof in an envelope, first class postage prepaid, addressed to:

(1) Rex E. Lee
Solicitor General

D. Lowell Jensen
Assistant Attorney General

Edwin S. Kneedler
Assistant to the Solicitor General

Department of Justice
Room 5614
10th and Constitution Avenue, N. W.
Washington, D. C. 20530

(2) David William Duncan
P. O. Box 179
Durango, CO 81301

and depositing same in the United States mails at Gainesville, Georgia, on the 29th day of Nov., 1982.

HARRISON P. CRONIC, Affiant

Sworn to and subscribed before me
this 29 day of November, 1982.

Evelyn D. Pendley
NOTARY PUBLIC

My Commission expires March 12, 1984

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-660

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

UNITED STATES OF AMERICA,

Petitioner

v.

HARRISON P. CRONIC,

Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, Harrison P. Cronic, asks leave to file the attached Responsive Brief to Petition For Writ of Certiorari without prepayment of costs and to proceed in forma pauperis. Respondent has previously been granted leave to proceed in forma pauperis by both the United States District Court, for the Western District of Oklahoma, and the United States Court of Appeals, for the Tenth Circuit. Respondent's Affidavit in Support of this Motion is attached hereto.

AFFIDAVIT

I, Harrison P. Cronic, being first duly sworn according to law, depose and say that I am the respondent in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, states that because of my poverty, I am unable to pay the costs of said case or to give security therefor, and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of proceeding in this court are true:

1. Are you presently employed?

A. No.

2. Have you received within the past twelve months any income from a business, profession, or other form of self-employment, or in the form of rent payments, interests, dividends, or other source?

A. No.

3. Do you own any cash or checking or savings account?

A. No.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

A. No.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

A. None.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

HARRISON P. CRONIC
Affiant

Sworn to and subscribed before me
this 29 day of November, 1982.

Evelyn B Pendley
NOTARY PUBLIC

My Commission expires March 12, 1984